

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	
v.)	I.D. # 9412011308
)	
CURTIS DEMBY)	
)	
Defendant)	
)	

Submitted: December 14, 2006
Decided: January 25, 2007

Upon Defendant's Second Motion for Postconviction Relief.
DENIED.

ORDER

Loren C. Meyers, Esquire, Chief of Appeals Division, Department of Justice, Wilmington, Delaware, Attorney for the State.

Curtis Demby, Smyrna, Delaware, *pro se*.

COOCH, J.

This 25th day of January 2007, upon consideration of Defendant's motion for postconviction relief, it appears to the Court that:

1. At Defendant's initial trial in March 1996, a jury found him guilty of First Degree murder and Possession of a Firearm During the Commission of a Felony (PFDCF). Defendant appealed his convictions and the Supreme Court reversed and remanded.¹ At the conclusion of Defendant's second trial in February 1998, a jury again found him guilty of First Degree Murder and PFDCF. He was subsequently sentenced to life imprisonment without the possibility of probation or parole for the murder conviction and an additional twenty years imprisonment for the firearms offense. The Supreme Court affirmed his convictions on January 10, 2000.²

2. Defendant filed his first motion for postconviction relief on January 31, 2003. The Court denied that motion and Defendant took no appeal from that decision. Defendant filed this second motion for postconviction relief on July 28, 2006. Defendant's motion states two grounds for relief: (1) "newly discovered evidence" and (2) the Court's improper refusal to provide him with trial transcripts.

3. Before addressing the merits of a motion for postconviction relief, the Court must first apply the procedural bars of Rule 61.³ If a procedural bar

¹ *Demby v. State*, 695 A.2d 1152 (Del. 1997) (holding that the trial court had erred by not admitting a certain videotape into evidence).

² *Demby v. State*, 744 A.2d 976 (Del. 2000).

³ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

exists, then the Court will not consider the merits of the postconviction claim.⁴

4. Rule 61(i)(1) will bar a motion filed more than three years after a final judgment of conviction unless it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final.⁵ A claimant can avoid this procedural bar, however, if under 61(i)(5), if the claimant can show that the court lacked jurisdiction or makes “a colorable claim that there was a miscarriage of justice because of a constitutional violation.”

5. A judgment of conviction is final “when the Supreme Court issues a mandate or order finally determining the case on direct review.”⁶

Defendant’s judgment of conviction became final on January 26, 2000 when the Supreme Court issued the mandate in his case. Accordingly, Defendant had until January 26, 2003 to file any postconviction motions under Rule 61. Defendant’s motion, filed on July 28, 2006, is clearly outside the applicable time limit. Therefore, only if Defendant demonstrates that the Court lacked jurisdiction or makes a colorable constitutional claim can he avoid this procedural bar.

⁴ *Id.*

⁵ An amendment changing the time limit in Rule 61(i)(1) to one year applies only to cases where the judgment of conviction became final after July 1, 2005.

⁶ Superior Court Criminal Rule 61(m)(2).

6. Defendant's first ground for relief is "newly discovered evidence." Specifically, Defendant claims that one of the jurors "may not have remained impartial" throughout Defendant's 1998 retrial. In support of this contention, he cites to the transcript where the same juror was being interviewed by the Court for potential service as a juror in later case, *State v. Garvey*. During the questioning, the Court asked the juror if the fact that Garvey was being prosecuted as a capital case, in contrast with the case she had previously served on (Defendant's), would make her think that Garvey was more deserving of the death sentence. The juror responded "I guess that had been a case where the previous case had been thrown out. So when—that wasn't an option for us to decide on the first case. We knew that going in." Defendant interprets this response to mean that the juror knew before his 1998 retrial that he had been convicted in his first 1996 trial.

7. However, the reasonable interpretation of this statement is that the juror knew that going into Defendant's case, the death penalty was not a potential sentence. This is further clarified later in the discussion when the juror stated "we found, of course, after the case was over, that the original trial had been thrown out for some reason." Therefore, Defendant's first ground for relief does not state a colorable constitutional claim and is time barred under Rule 61(i)(1).

8. Defendant's next contention is that the Court "denied [Defendant] the right to petition for postconviction relief because he can't pay cost for trial transcripts." Defendant claims that he has eight "potential claims for relief" that require the transcripts.⁷ He further states that prison officials "confiscated and lost" his legal documents pertaining to this case.

9. This allegation does not entitle Defendant to relief, however, for the same reasons that the Court stated in its June 3, 2003 letter denying Defendant's motion for transcripts. According to trial counsel, Defendant's family members previously came to his office to collect the transcripts and he did not retain any additional copies.⁸ Trial counsel also furnished all remaining documents in his file to Defendant.⁹ Moreover, "[t]here is no constitutional right to the provision of a free trial transcript for the preparation of a post-trial motion."¹⁰ Accordingly, Defendant's second ground for relief does not make a colorable constitutional claim and is time barred under Rule 61(i)(1).

10. For the reasons stated above, Defendant's second motion for postconviction relief is **DENIED**.

⁷ These "potential claims for relief" include "[p]ossible improper expert testimony by police officer . . . [p]ossible improper rebuttal testimony from State's primary witness . . . and [a]ny other possible error that may appear in the trial record"

⁸ Joseph A. Gabay Aff. at ¶ 29.

⁹ *Id.* at ¶ 30.

¹⁰ *State v. Doran*, 1992 WL 1468859 (Del. Super.).

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
cc: Investigative Services
Mark W. Bunitsky, Esquire
Joseph M. Bernstein, Esquire
Joseph A. Gabay, Esquire